

¹ Order (Sept. 26, 2003).

Judge Benedict did not allow respondent and its respective insurance companies to present evidence on the issues of compensability, including: whether the injury arose out of and in the course of the employee's employment; date of accident, and which insurance carrier is on the risk.²

Respondent and Atlantic Mutual Insurance Company (Atlantic) likewise appealed alleging that:

[T]he Administrative Law Judge exceeded his jurisdiction by announcing this decision to appoint a physician to perform an independent medical examination at the conclusion of the claimant's testimony without allowing the respondent and insurance carrier to cross-examine the claimant or to otherwise present evidence[.]³

Atlantic also denies claimant's accidental injury arose out of and in the course of her employment with respondent and, in the alternative, argue any benefits should be paid by Royal rather than Atlantic. Furthermore, both Royal and Atlantic argue that if claimant did suffer accidental injury arising out of and in the course of her employment with respondent, the date of accident was during the other insurance carrier's period of coverage.

Claimant argues that the Board is without jurisdiction to review the ALJ's Order because the ALJ did not order preliminary benefits pursuant to K.S.A. 44-534a, did not exceed his jurisdiction in ordering an IME of claimant and an order for an IME is not a final order. Rather, an order for an IME is an interlocutory order that the ALJ has the jurisdiction to order at any time during the pendency of the case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board has held on many occasions that an order for an IME is an interlocutory order.⁴ It is neither a preliminary hearing award of benefits entered under the preliminary hearing statute nor it is a final award.

The ALJ did not exceed his jurisdiction nor did he violate respondent's rights to due process of law by announcing his intention to order an IME during the preliminary hearing before respondent had cross examined claimant and presented its witnesses. An ALJ has the authority to order an IME at any time. And although the IME report may be considered

² [Royal's] Request for Review by the Workers' Compensation Appeals Board (filed Oct. 6, 2003).

³ [Atlantic's] Application for Review by Workers Compensation Appeals Board (filed Oct 6, 2003).

⁴ See e.g., *Scott v. Total Interiors*, No. 244,761, 2000 WL 1134444 (Kan. WCAB July 28, 2000); *Burton v. Labor Ready, Inc.*, No. 225,093, 1999 WL 1008038 (Kan. WCAB Oct. 29, 1999); *Kitchen v. Luce Press Clippings, Inc.*, No. 228,213, 1998 WL 165879 (Kan. WCAB. March 17, 1998).

by the ALJ in deciding claimant's entitlement to preliminary hearing benefits, the order for an IME is not a preliminary hearing order. Accordingly, the respondent's statutory right to present evidence as set forth in K.S.A. 44-534a is inapplicable to the ALJ's authority to order an IME. Furthermore, the ALJ did not deny respondent its right to cross examine claimant and present evidence. Rather, the ALJ noted his press for time and offered respondent the opportunity to cross examine claimant later that day. Counsel for Royal and Atlantic were not interested in proceeding in that manner and declined the ALJ's offer.

The claimant's request for preliminary hearing benefits is still before the ALJ. Claimant's request for medical treatment has not been decided. The IME examination is not medical treatment. It can be part of the evidence the ALJ will consider in making that determination, as in this case, but there is no indication in the record that respondent will be denied the opportunity to cross examine claimant and present its evidence before that determination is made.

Accordingly, as the ALJ's Order is interlocutory and not final, the Board is without jurisdiction to review the Order.

WHEREFORE, the Appeals Board dismisses this appeal leaving the September 26, 2003 Order for independent medical examination in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of December 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Roger D. Fincher, Attorney for Claimant
Karen D. Pendland, Attorney for Respondent and Royal Indemnity Co.
Denise E. Tomasic, Attorney for Respondent and Atlantic Mutual Ins. Co.
Bryce D. Benedict, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director